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U.S. Treatment of Prisoners in Iraq: Selected Legal Issues

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U.S. Treatment of Prisoners in Iraq: Selected Legal Issues

Summary

A recent Army report charging that U.S. Military Police and other personnel, including civilian contractor personnel, abused Iraqi prisoners held under the authority of the Coalition Provisional Authority (CPA) has given rise to questions regarding the applicable law. The report was the result of an Army investigation initiated after a soldier turned over to military law enforcers photographs depicting U.S. military personnel subjecting Iraqi detainees to treatment that has been described as degrading, inhumane, and in some cases, tantamount to torture. A report by the International Committee of the Red Cross (ICRC) relating to the treatment of prisoners by U.S. forces was also made public.

The international law of armed conflict, in particular, those parts relating to belligerent occupation, applies in Iraq. The four Geneva Conventions of 1949 related to the treatment of prisoners of war (POW) and civilian detainees, as well as the Hague Regulations define the status of detainees and state responsibility for their treatment. Other international law relevant to human rights and to the treatment of prisoners may also apply. For example, the International Covenant on Civil and Political Rights prohibits "cruel, inhuman or degrading treatment." The U.N. Declaration on Human Rights and the U.N. Convention Against Torture (CAT) may also be relevant. Federal statutes that implement the relevant international law, such as the War Crimes Act of 1996 and the Torture Victim Protection Act, as well as other criminal statutes with extraterritorial application may also come into play. Finally, the law of Iraq as amended by regulations issued by the Coalition Provisional Authority (CPA) may also apply in some circumstances.

This report summarizes pertinent provisions of the Geneva Conventions Relative to the Treatment of Victims of War (Geneva Conventions) and other international agreements concerning the treatment of certain types of prisoners. The report begins with a discussion of international and U.S. standards regarding the treatment of prisoners. A discussion of accountability in case of breach of these standards follows, including potential means of asserting jurisdiction over alleged violators, either in military courts under the Uniform Code of Military Justice (UCMJ) or U.S. federal courts, by applying U.S. criminal statutes that explicitly apply extraterritorially or within the special maritime or territorial jurisdiction of the United States (as defined in 18 U.S.C. § 7) or by means of the Military Extraterritorial Jurisdiction Act (MEJA). Finally, the report discusses international requirements to provide redress for those whose treatment at the hands of U.S. officials may have fallen below the standards outlined in the first section of the report. This report will be updated.

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A recent Army report charging that U.S. Military Police and other personnel, including civilian contractor personnel, abused Iraqi prisoners held under the authority of the Coalition Provisional Authority (CPA) has given rise to questions regarding the applicable law. The report[1] was the result of an Army investigation initiated after a soldier turned over to military law enforcers photographs depicting U.S. military personnel subjecting Iraqi detainees to treatment that has been described as degrading, inhumane, and in some cases, tantamount to torture. A report by the International Committee of the Red Cross (ICRC) relating to the treatment of prisoners by U.S. forces was also made public.[2]

This report summarizes pertinent provisions of the four 1949 Geneva Conventions Relative to the Treatment of Victims of War (collectively known as "the Geneva Conventions") and other international agreements concerning the treatment of certain types of prisoners. The report begins with a discussion of international and U.S. standards regarding the treatment of prisoners. A discussion of accountability in case of breach of these standards follows, including potential means of asserting jurisdiction over alleged violators, either in military courts or U.S. federal courts. Finally, the report discusses international requirements and U.S. procedures to provide redress for those whose treatment at the hands of U.S. officials may have fallen below the standards outlined in the first section of the report.

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[1]Lt. General Ricardo Sanchez, the senior U.S. Commander in Iraq, requested U.S. Central Command (CENTCOM) to conduct an investigation. Major General Antonio M. Taguba was appointed to conduct an investigation into the 800th MP Brigade's detention and internment operations at the Abu Ghraib prison in Baghdad. General Taguba's report was issued on February 26, 2004, but was not made publicly available until graphic photos depicting U.S. soldiers abusing Iraqi prisoners were shown on *60 Minutes II*, April 28, 2004. The report is available on many websites, including [http://www.npr.org], but technically remains classified.

[2]Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), *available at* [http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf] [hereinafter "ICRC Report"].

International Law Protecting Prisoners

The international law of armed conflict, in particular, those parts relating to belligerent occupation, applies in Iraq.[3] The four Geneva Conventions of 1949[4] and the Hague Regulations[5] play an important role. Other international law relevant to human rights and to the treatment of prisoners may also apply. For example, the International Covenant on Civil and Political Rights prohibits "cruel, inhuman or degrading treatment."[6] The Convention Against Torture (CAT) may also be relevant.[7]

Protection of Prisoners under the Geneva Conventions of 1949

The purpose of the four Geneva Conventions of 1949 is to mitigate the harmful effects of war on all persons who find themselves in the hands of a belligerent party. Each of the conventions provides specific protections for a defined category of persons who are not, or are no longer, taking part in hostilities, including those who are detained for any reason. Whatever status a particular detainee may be assigned, the Geneva Conventions prohibit torture and inhumane or degrading treatment in all circumstances, including for purposes of interrogation.

Prisoners of War (POW). POW status under the third Geneva Convention ("GPW") offers the highest level of protection, including the right to be tried by court martial (or national court, if a soldier of the Detaining Power could be tried that way) if accused of a crime. In case of doubt as to whether a particular captive is entitled to POW status, the Detaining Power must treat the detainee as a POW until a competent tribunal determines the status of the individual. (GPW Article 5).

Article 13, GPW, provides that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." Article 14 states that prisoners of war "are entitled in all circumstances to respect for their persons and their honor." Article 17 states that "[n]o physical or

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[3]For a description of law currently applicable in Iraq, see CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty*.

[4]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [hereinafter "GPW"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 [hereinafter "GC"], (entered into force Oct. 21, 1950). Both the United States and Iraq are parties to the Conventions.

[5] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (hereinafter "Hague Regulations").

[6]*See* International Covenant on Civil and Political Rights, art. 7, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

[7]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,Dec. 10, 1984, 1465 U.N.T.S. 113, *reprinted in* 23 I.L.M. 1027 (1984) and 24 I.L.M. 535 (1985) (entered into force June 26, 1987)[hereinafter "CAT"].

mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Interrogators are permitted to ask questions, but POWs are required to divulge only their name and limited identifying information. Tactics such as trickery or promises of improved living conditions are not foreclosed.[8]

Civilians Detainees. Civilians in occupied territory are "protected persons" under the fourth Geneva Convention ("GC"), and are entitled under article 27 "in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs." While an occupying power is permitted to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war," Article 27 provides further that "[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Article 32 forbids any "measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. . . [including] not only . . . murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents."

Civilians may be detained or interned by an occupying power only if "security requirements make such a course absolutely necessary." (GC art. 42). Internment or assigned residence is the most severe measure allowed in the cases of protected civilians who pose a definite security threat (GC art. 41(1)), and these measures are to be reviewed by a court or administrative board at least twice annually. (GC art. 43). Article 31 provides that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."

Protected civilians may be imprisoned as a punitive measure only after a regular trial, subject to the protections in articles 64 through 77. Additionally, article 33 provides that "[c]ivilians may not be punished for an offence he or she has not personally committed," and prohibits all forms of collective penalties and intimidation.

Other Detainees. Some argue that "unlawful combatants" are neither entitled to POW status nor civilian rights under the Geneva Conventions.[9] The Department of Defense has not determined, however, that any of the detainees in Iraq are

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[8]*See* HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 108 (1979).

[9]For an explanation of the "unlawful combatant" issue, see CRS Report RL31367, *Treatment of 'Battlefield Detainees' in the War on Terrorism*.

"unlawful combatants."[10] Others assert that persons who commit hostile acts but are not entitled to POW status have the status of civilians.[11] Article 5 of GC provides some exceptions for the treatment of persons deemed security risks:

> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.[12]
>
> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Nationals of a state that is not a party to the conventions are not "protected persons" under GC, and nationals of neutral states are not regarded as protected persons "while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Persons not covered by more favorable provisions of the Geneva Conventions retain protection under Common

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[10]*See* Eric Schmitt and Douglas Jehl, *M.P.'s Received Orders to Strip Iraqi Detainees*, N.Y. TIMES, May 18, 2004, at A1, A11.

[11]*See* Department of the Army, FM 27-10, The Law of Land Warfare (hereinafter "FM 27-10") para. 78 (1956) states:

> If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW, not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a "protected person" within the meaning of Article 4, GC. (*internal citations omitted*).

[12]Rights of communication means communication with the outside world, including those defined in articles 25 (correspondence of a personal nature with family members), 30 (visitation by ICRC representatives and other relief organization personnel), 106 (right to notify family of internment), and 107 (right to send and receive mail).

Article 3 to the Geneva Conventions,[13] which prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment."[14]

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[13] The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 3, expressly applicable only to conflicts "not of an international nature, " has been described as "a convention within a convention" to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. *See* JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 32 (1975). Originally a compromise between those who wanted to extend the Convention's protection to all insurgents and rebels and those who wanted to limit it to wars between states, Common Article 3 is now considered to have attained the status of customary international law. *See* KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 188 (2001). Common Article 3 is now widely considered to embody the minimum set of rights applicable to persons in international armed conflicts. See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 218, 255 (June 27); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion on Jurisdiction ¶¶ 65-74 (Aug. 10, 1995); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 692-95, 813-14, 816-17 (2d ed. 2000); *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS 14 (J. Pictet, ed., 1960)[hereinafter "COMMENTARY") ("This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."). Reciprocity is not considered necessary for its application to a State party. *See id.* at 38 (noting that "the effect on [a State party] of applying Article 3 [in an insurgency] cannot be in any way prejudicial; for no Government can possibly claim that it is ' entitled ' to make use of torture and other inhuman acts prohibited by the Convention, as a means of combating its enemies").

[14]In pertinent part, Common Article 3 provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Such persons may also be protected by article 75 of Additional Protocol I to the Geneva Conventions.[15] Article 75 provides that "persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions . . . shall be treated humanely in all circumstances" and that each state party "shall respect the person, honor, convictions and religious practices of all such persons." Paragraph 2 of Article 75 prohibits, "at any time and in any place whatsoever, whether committed by civilian or military agents. . . violence to the life, health, or physical or mental well-being of persons, in particular . . . torture of all kinds, whether physical or mental," "corporal punishment," and "mutilation"; "outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault"; as well as "threats to commit any of the foregoing acts."

Responsibility for Breaches. The proper treatment of prisoners is the responsibility of the detaining power and the individuals directly responsible for their conditions.[16] Mistreatment of prisoners of war may incur individual liability under both international norms and the Uniform Code of Military Justice (UCMJ) and may amount to "grave breaches" under the Geneva Conventions. Grave breaches under the GPW include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial " in connection with an armed conflict. (GPW art. 130).[17] Grave breaches under the GC include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, . . . or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention . . ."). (GC art. 147).

The Geneva Conventions obligate detaining powers to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" grave breaches, and to "search for persons alleged to have

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[15]Protocol Additional to the Geneva Conventions of 12 August 1949 and Related to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.,*reprinted in* 16 I.L.M. 1391 ("Protocol I"). The United States has not ratified Protocol I, but article 75 is widely considered to be universally binding as customary international law.

[16] GPW art. 12 addresses the strict State responsibility of a Detaining Power:

> Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

[17]"Grave breaches" may also include "serious breaches" listed under art. 13, GPW. *See* LEVIE, *supra* note 8, at 352 (noting that the French version of the treaty text uses the same term in both articles 13 and 130). Some authors distinguish "torture" from other forms of maltreatment in that its purpose is to elicit a confession or information. *Id*. at 357-58 (arguing that, to the contrary, "torture inflicted as punishment, out of sheer sadism, or . . . to 'convert' an adamant prisoner of war to the Detaining Power's political ideology" or even torture without motive should be considered a grave breach).

committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." (GPW art. 129). In addition to the foregoing penal provisions for grave breaches, Article 129 directs each party to take measures to suppress all violative acts short of grave breaches. Article 127 obligates parties to instruct their people, in particular members of the military, about the requirements of the GPW. Article 127 provides further that "[a]ny military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions." Detainees have the right to protest their treatment to the detaining power or to a neutral power or organization serving as the protecting power (ordinarily the International Committee of the Red Cross) (GPW art. 78).

U.S. Military Implementation. U.S. Implementation of the Geneva Conventions with respect to prisoners is found primarily in United States Army Regulation (AR) 190-8.[18] AR 190-8 prescribes the rules for the treatment of enemy prisoners of war (EPW), retained personnel (RP – medical personnel, chaplains, and Red Cross representatives), civilian internees (CI), and other detainees (OD – whose status has not yet been determined but who are to be treated as EPW in the meantime), who are in the custody of the U.S. Armed Forces. Paragraph 1-5 of AR 190-8 sets forth the general standards:

> *a.* U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:
>
> (1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.
>
> (2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.
>
> (3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered [in accordance with] due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.
>
> (4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).
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> *b.* All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

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[18] *See also* Department of the Army Field Manual 27-10, The Law of Land Warfare (1956) [hereinafter "FM 27-10].

> *c.* All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.
>
> *d.* Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.
>
> *e.* A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.
>
> . . .

War Crimes Act. War crimes committed by persons not subject to the UCMJ may be prosecuted in federal court under the War Crimes Act of 1996.[19] Under that statute, war crimes committed by or against U.S. nationals are punishable by fine or imprisonment, and a war crime that results in the death of a victim, is subject to the death penalty. (18 U.S.C. § 2441 (a-b)). War crimes are defined to include grave breaches under the Geneva Conventions and violations of Common Article 3.[20] (18 U.S.C. § 2441 (c)(1-3)).

Universal Declaration of Human Rights (UDHR)

The United Nations has a duty under its Charter to the promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[21] The U.N. Charter obligates U.N. member states to take joint and separate action to promote human rights and fundamental freedoms for all persons without distinction as to race, sex, language or religion.[22] The United Nations General Assembly adopted the UDHR in 1948 to codify those human rights and fundamental freedoms referred to in the U.N. Charter.[23] The UDHR prohibits arbitrary arrest, detention or exile,[24] as well as torture

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[19]P.L. 104-192, 110 Stat. 2104 (1996), *codified at* 18 U.S.C. §§ 2441 *et seq.*

[20]*Supra* note 14.

[21]U.N. Charter art. 55.

[22]*Id.* art. 56.

[23]Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

[24]*Id*. art 9. The United States has taken the position that the prohibition against arbitrary detention exists as a norm under customary international law. *See* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND (continued...)

and cruel, inhuman or degrading treatment or punishment.[25] Although it is a General Assembly Resolution rather than a treaty, and is therefore technically non-binding, some if not most provisions are considered to be customary law.[26] The UDHR does not contain an enforcement mechanism.

International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights was adopted by the United Nations to set forth in greater detail the Universal Declaration of Human Rights. The ICCPR prohibits arbitrary detention[27] and "cruel, inhuman or degrading treatment."[28] Article 10 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 4 provides for derogation "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . . to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." However, no derogation is permitted from certain rules, including articles 6 (pertaining to the death sentence), 7 (prohibiting cruel, inhuman or degrading treatment), 8 (paragraphs 1 and 2 – prohibiting slavery and servitude), 15 (prohibiting retroactive penal sanctions), and 16 (providing all persons are to be recognized as such by the law).

The United States ratified the ICCPR in 1992, subject to a number of reservations, understandings and declarations, including a declaration that the ICCPR is non-self-executing–that is, it does not give rise to a private action in court. The United States notified the UN that it interprets "cruel, inhuman or degrading treatment or punishment" to mean the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. President Clinton established the Interagency Working Group on Human Rights Treaties to implement the ICCPR and other human rights treaties[29] with the mandate to "provide guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and

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[24](...continued)
PRACTICE 136 (3d ed. 1995) (citing Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. Pleadings 182 n.36 (Jan. 12, 1980)).

[25]UDHR art. 5.

[26]*See* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 82 (1989).

[27]*See* International Covenant on Civil and Political Rights, art. 9(1), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR] ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.")

[28]*Id.* art. 7.

[29]Exec. Order 13,107, 63 Fed. Reg. 68991 (Dec. 10, 1998).

related matters."[30] In 2001, the responsibilities of the Working Group were transferred to the newly created National Security Council (NSC) Policy Coordination Committee (PCC) on Democracy, Human Rights, and International Operations.[31] The United States has not officially proclaimed an emergency or named measures that would derogate from the ICCPR.

U.N. Convention Against Torture (CAT)

In 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).[32] CAT requires parties to take measures to prevent torture from occurring within any territory under their respective jurisdictions, regardless of the existence of "exceptional circumstances," such as a war or threat of war, internal political instability or other public emergency.[33] CAT defines torture as

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[34]

Torture does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions." Nor does it include conduct that unintentionally causes severe pain and suffering.

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[30] *Id.* § 4. The Order also outlined responsibilities of executive departments and agencies in compliance with obligations under human rights treaties. *Id.* § 2.

[31] National Security Presidential Directive 1 (NSPD-1), February 13, 2001.

[32] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter "CAT"]. The United States submitted a notification to the U.N. Secretary General stating that "... nothing in [CAT] requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." Additionally, the United States declared that, "pursuant to article 21, paragraph 1, of [CAT], that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration." Senate ratification was made subject to the reservation that "the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

[33] *Id.* art. 2.

[34] *Id.* art. 1.

CAT obligates its parties to proscribe and punish acts of torture under their criminal laws, including any attempt to commit torture or any act that constitutes complicity to torture.[35] Additionally, member States are to make the crime of torture an extraditable offense under their domestic laws, if necessary under their laws pertaining to extradition.[36] States parties also undertake to provide necessary training to prevent torture and "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" to "law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment,"[37] and to "keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."[38] Statements induced by torture are not to be admitted as evidence in a criminal proceeding against the victim.[39] Victims have a right, under the CAT, to have their allegations investigated by impartial officers and to pursue means of redress that afford fair and adequate compensation to the victim or the victim's heirs.[40]

U.S. Implementation of CAT. Congress passed legislation in 1994 to implement the requirements of the CAT (18 U.S.C.§ 2340 *et seq*.). Section 2340, along the lines of the CAT, defines torture in subsection (1) as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." "Severe mental pain or suffering" means the prolonged mental harm caused by or resulting from the infliction or threat to inflict severe physical pain or suffering; the use or threat to use "mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality"; threats of imminent death; and threats to inflict the above forms of abuse on third persons. (18 U.S.C. § 2340). Violators are subject to fine or imprisonment for not more than 20 years, or both, and if death results, violators may receive up to life in prison or the death penalty. (18 U.S.C. § 2340A). Those convicted of conspiracy to commit torture may be punished to the same extent as violators themselves, except that they are not eligible to receive the death penalty. (18 U.S.C. § 2340A(c)).

Torture Victim Protection Act (TVPA). In 1990, Congress enacted the Torture Victim Protection Act (TVPA)[41] to provide an avenue of redress for victims of torture overseas. The TVPA created a cause of action for any person to seek

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[35]CAT art. 4.

[36]*Id.* art. 8.

[37]*Id.* art. 10.

[38]*Id.* art. 11.

[39]*Id.* art 15.

[40]*Id.* arts. 13-14.

[41]28 U.S.C. § 1350 note.

recovery for acts of torture committed overseas from an individual responsible for the acts who can be "found" within the United States for the purpose of serving process.[42] Only individuals with a certain level of personal responsibility may be sued under the TVPA; other entities are not amenable to suit. It may also be possible for abused prisoners to bring suit under the Alien Tort Statute.[43]

Accountability for Violations

It was established during the Nuremberg Tribunals after World War II that persons who commit war crimes or crimes against humanity may be held individually accountable, whether they are members of the military or civilians.[44]

Military Personnel

Members of the armed forces are directly subject to the laws of war and may be tried by international or national tribunals for violations. Military personnel stationed overseas are also subject to the domestic law of the country where they are stationed, ordinarily under the terms of a status of forces agreement (SOFA) with the host country. As long as the United States remains an occupying power in Iraq, service members are not subject to the Iraqi courts.[45]

International Law. Members of the armed forces of a party to an international armed conflict may be held individually liable for breaches of the law of war, including for maltreatment of prisoners under their control, whether such prisoners are under their immediate control or indirect control through the chain of command. It is not a defense against a charge of any grave breach of the Geneva Conventions that an accused was merely following orders,[46] although such

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[42] *Id.*

[43] 28 U.S.C. § 1350; *see* CRS Report RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views*.

[44] LEVIE, *supra* note 8, at 386-87 (noting, however, a Department of Justice opinion that "only persons exercising governmental authority ordinarily would be in a position to commit grave breaches against protected persons. . .").

[45] Under CPA Order 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, June 23, 2003, Coalition forces are immune from Iraqi legal processes for their conduct during the period the CPA is in power. See CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty*.

[46] *See* FM 27-10, *supra* note 18, at para. 509, stating that

> a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
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> b. In considering the question whether a superior order constitutes a valid defense, the

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circumstances may mitigate liability. Commanders may be held vicariously liable for abuses committed by persons under their command even where no orders were issued, if it can be proven that the commander knew or should have known that such abuses were taking place.[47]

U.S. Military Law. Service members are subject to military jurisdiction under the Uniform Code of Military Justice (UCMJ). They may be tried for serious crimes by general court-martial, and for less serious crimes by summary court-martial or special court-martial. Service members may also receive administrative sanctions or non-judicial punishment.

The mistreatment of prisoners may be punishable as a crime under article 93, UCMJ, which forbids "cruelty toward, or oppression or maltreatment of, any person subject to [the] orders [or the accused]. . . ."[48] Article 97 prohibits the arrest or detention of any person except as provided by law.[49] The UCMJ also punishes ordinary crimes against persons such as assault and assault consummated by a battery,[50] assault with intent to commit rape,[51] rape,[52] sodomy,[53] indecent assault,[54] murder,[55] manslaughter[56] and maiming.[57] Article 134, UCMJ, also punishes, "[t]hough not specifically mentioned in [the UCMJ], all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which

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[46](...continued)

> court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.

[47]*See* LEVIE, *supra* note 8, at 390-91 (citing the *Yamashita* case, 327 U.S. 1 (1946), stating that it was generally followed in post-World War II tribunals).

[48]10 U.S.C. § 893.

[49]10 U.S.C. § 897.

[50]10 U.S.C. § 928.

[51]10 U.S.C. § 934.

[52]10 U.S.C. § 920.

[53]10 U.S.C. § 925.

[54]10 U.S.C. § 934.

[55]10 U.S.C. § 918

[56]10 U.S.C. § 919.

[57]10 U.S.C. § 924.

persons subject to [the UCMJ] may be guilty. . . ."[58] Attempts, conspiracy, and solicitation to commit a crime are also punishable.[59]

U.S. Federal Law. U.S. service members are also subject to federal statutes and may be tried in federal court to the same extent as civilians. Ordinarily, soldiers who are accused of committing a crime overseas would be prosecuted by court-martial, and would be protected by the Double Jeopardy Clause[60] from being prosecuted in federal court for the same crime. Soldiers accused of participating in criminal activity with civilians who are covered by the Military Extraterritorial Jurisdiction Act (MEJA) may also be tried in federal court.[61] Former service members who committed crimes overseas prior to their separation from military service may also be prosecuted under MEJA.

Civilian Contractors

International Law. The status of contract personnel that serve as part of an occupying force falls into a grey area. While civilians accompanying the armed forces in the field are generally entitled to treatment as prisoners of war if captured by an enemy State, they are considered non-combatants who are not authorized to take part in hostilities. To the extent that they carry out military functions in support of U.S. forces, they are liable under international law if they commit war crimes.[62] In particular, their acts could amount to "grave breaches" under the Geneva Conventions, giving rise to both personal liability and state responsibility attributable to the United States.

U.S. Federal Law. U.S. contractor personnel and other U.S. civilian employees in Iraq are subject to prosecution in U.S. courts under a number of circumstances. Jurisdiction of federal statutes extends to U.S. nationals at U.S. facilities overseas.[63] In addition, many federal statutes prescribe criminal sanctions

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[58]10 U.S.C. § 934.

[59]10 U.S.C. §§ 880-882.

[60]U.S. CONST. amend V; *see* Wade v. Hunter, 336 U.S. 684 (1949).

[61]18 U.S.C. § 3261 *et seq.* *See infra* note 65 and accompanying text.

[62]*See* FM 27-10, *supra* note 18, at para. 499 (defining "war crime" as "the technical expression for a violation of the law of war by any person or persons, military or civilian"); LEVIE, *supra* note 8, at 386-87.

[63] 18 U.S.C. § 7 (as amended by the § 804 of the USA PATRIOT Act, P.L. 107-56, title VIII, Oct. 26, 2001, 115 Stat. 377) defines "special maritime and territorial jurisdiction of the United States" to include:

> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
> (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

18 U.S.C. § 7(9) (excluding persons covered by the Military Extraterritorial Jurisdiction Act, 18

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for offenses committed by or against U.S. nationals overseas,[64] including the War Crimes Act of 1996.[65] The federal prohibition on torture, 18 U.S.C. § 2340 *et seq*, applies to acts outside the United States regardless of the nationality of the perpetrator (non-U.S. nationals need only be "found" in the United States to be prosecuted.).[66]

Additionally, persons who are "employed by or accompanying the armed forces" overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000[67] for any offense that would be punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States. (18 U.S.C. § 3267). Persons "[e]mployed by the armed forces" is defined to include civilian employees of the Department of Defense (DoD) as well as DoD contractors and their employees (including subcontractors at any tier). (18 U.S.C. § 3267 (1)(A)). It does not, however, cover civilian contract personnel whose contracts are managed by other federal agencies or departments, and it is unclear whether personnel employed under contracts directly with the CPA are covered. Thus, whether contract employees are subject to federal court jurisdiction for crimes depends on the crime alleged to have been committed, the place where it was committed, and the suspect's contractual relationship with DoD. In February, 2004, the Department of Defense issued proposed regulations for implementing MEJA, but these have not yet gone into effect.[68]

Military Law. It is less clear whether contract personnel are amenable to military prosecution under the UCMJ for conduct that took place in Iraq. Article 2(a)(10), UCMJ, extends military jurisdiction, in "time of war," to "persons serving with or accompanying an armed force in the field." As a reflection of the constitutional issues that arise whenever civilians are tried in military tribunals, recognized by the Supreme Court in *Reid v. Covert*,[69] courts later interpreted the term "war" to mean only wars declared by Congress.[70] However, the *Reid* Court

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[63](...continued)
U.S.C. § 3261 *(see infra* note 65 and accompanying text.)).

[64]*See* CRS Report 94-166, *Extraterritorial Application of American Criminal Law*.

[65]*See supra* note 19 and accompanying text.

[66]*Supra* p. 11 (discussion of U.S. implementation of CAT).

[67]P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. § 3261 *et seq.*

[68]69 Fed. Reg. 4,890 (Feb. 2, 2004).

[69]*See* Reid v. Covert, 354 U.S. 1 (1957) (overturning two cases involving civilian spouses convicted at courts-martial, pursuant UCMJ Art. 2(10) as "persons accompanying the armed forces," for the murders of their military spouses at overseas bases); McElroy v. Guagliardo, 361 U.S. 281 (1960) (civilian employee could not be tried by court-martial for conduct overseas).

[70]*See* Robb v. U. S., 456 F.2d 768 (Ct.Cl. 1972); U.S. v. Averette, 41 C.M.R. 363 (1970); *see also* Latney v. Ignatious, 416 F.2d 821 (D.C. Cir. 1969)(finding that even if the Vietnam conflict constituted a "war" within the meaning of the UCMJ, conduct must be intimately connected to military in order for jurisdiction under Art. 2(10) to apply).

distinguished the case at issue from *Madsen v. Kinsella*,[71] in which a military spouse was tried by military commission in occupied Europe, on the basis that

> [that case] concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with Army or not.[72]

If *Madsen* remains valid, if and for so long as the United States is considered an "occupying power" in Iraq, it may be acceptable under the Constitution to subject contractors there to military jurisdiction. Additionally, if offenses by contract personnel can be characterized as violations of the law of war, the UCMJ may extend jurisdiction to try suspects by court-martial[73] or by military commission.[74] However, the validity of *Madsen* may have been undermined for the purposes of operations in Iraq by later case law requiring a congressional declaration of war and otherwise limiting military jurisdiction over civilians.[75]

Coalition Provisional Authority (CPA) Authority over Contractors. Contractors to the CPA or any of the coalition forces in Iraq operate under the Coalition Provisional Authority orders. Under Order Number 17, issued June 27, 2003, contractors are exempt from Iraqi laws for acts related to their contracts.[76] That

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[71]343 U.S. 341 (1952)(upholding the trial of civilian by military commission for non-military crime in occupied territory). Jurisdiction in *Madsen* was found in Article 15 of the Articles of War (substantially identical to 10 U.S.C. § 821, *infra* note 71). 343 U.S. at 350-55 (holding that the "law of war" includes "that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government").

[72]354 U.S. at 35, & n 10.

[73]*See* 10 U.S.C. § 818 (providing jurisdiction over "any person who by the law of war is subject to trial by military tribunal").

[74]*See* 10 U.S.C. § 821 (preserving "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals"); *cf Ex Parte* Quirin, 317 U.S. 1 (1942).

[75]*See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304 (1945)(military tribunal had no jurisdiction over civilians for non-military crimes where martial law was in operation but courts could function); United States *ex rel*. Toth v. Quarles, 350 U.S. 11 (1955) (holding that an honorably discharged former soldier could not be tried by court-martial for a crime he allegedly committed while stationed overseas); Reid v. Covert, 354 U.S. 1 (1957) (setting aside the military conviction of a civilian dependant of a service member stationed overseas); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) (voiding the conviction by court-martial of a military wife charged with involuntary manslaughter); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960)(holding that civilian employees of the military may not be tried by court-martial, even for crimes committed overseas).

[76]Order 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, 27 June 2003, *available at* [http://www.cpa-iraq.org/regulations/CPAORD17

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order provides that such contractors and their subcontractors and employees who do not normally reside in Iraq are "not subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA" (section 3(1)), and shall be immune from Iraqi legal processes for acts performed under the contracts (section 3(2)). Iraqi and CPA legal processes could commence for acts or omissions outside the scope of a contract only with the written permission of the Administrator of the CPA (section 3(3)). The immunity of contractors applies only to conduct that occurs while the CPA has authority in Iraq (section 4).[77]

Redress

This section briefly summarizes international law regarding the right to compensation in cases involving breaches of international law. Conduct that violates international obligations is attributable to a State if it is committed by the government of the State or any of its political subdivisions, or by any official, employee, or agent operating within the scope of authority of any of these governments, or under color of such authority.[78] Principles of State responsibility require a State in breach of an obligation to another State or international organization, without justification or excuse under international law, to terminate the violation and provide redress.[79]

The matter of reparations for war crimes is ordinarily something that is negotiated through a peace treaty at the end of the armed conflict. Reparations may take the form of monetary compensation for the damages caused by the violation, but they may also take such forms as restitution in kind, restoration of the *status quo ante*, or specific performance of an undertaking.[80] It is possible that the respective governments may reach an agreement for some type of reparation, and yet the individual victims are not guaranteed any compensation at all.[81]

The primary remedy for a breach of State responsibility with respect to the maltreatment of detainees appears to be the payment of reparations. The Red Cross commentary on the GPW states that

> [c]ompensation for damage resulting from the unlawful act, although not stipulated explicitly, is undoubtedly implied by the authors of Article 12.

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[76](...continued)
Status_of_Forces.pdf] (last visited May 20, 2004).

[77]For more information on the transfer of sovereignty, see CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty*.

[78]AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Vol II (1987), § 207.

[79]*Id*. at § 901, comment a.

[80]*Id.* at comment d.

[81]*Cf* Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1523 (D.C. Cir. 1984)("Final settlement between sovereigns does release the defendant sovereign from further liability.").

> Consequently, a State which bears responsibility for a violation of the Convention is in duty bound to make good the damage caused, either by restoring everything to the former condition . . . or by paying damages, the choice resting, as a general rule, with the injured party. In many cases, however, reparation will have to be limited to the payment of damages, when the nature of the prejudice caused makes restoration impossible. An example of this would be the physical and mental injury suffered by prisoners . . . .[82]

Even though compensation may be contemplated, however, an individual who is harmed may not be able to seek redress directly, particularly when, as under the Convention, no private right of action expressly is granted. Under traditional international practice, the State of an individual's nationality is regarded as having suffered the harm when an international agreement is breached, and it is up to that State alone to press for reparation. However, international law may be changing in that regard. For example, the Rome Statute of the International Criminal Court provides for the compensation of victims of international crimes out of a trust fund.[83] Victims may also be able to sue for damages in U.S. courts, for example, under the Alien Tort Statute or the Torture Victim Protection Act.[84]

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[82] *See* COMMENTARY, *supra* note 13, at 130.

[83] *See* Rome Statute of the International Criminal Court art. 79, U.N. Doc. A/CONF.183/9 (1998)("Rome Statute"). The United States is not a party to the Rome Statute, but participated in its drafting. *See* CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*. The inclusion of a provision for compensation arguably shows some evidence of an emerging individual right to redress.

[84] *See supra* note 43; *see, e.g.* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).